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Notable Exceptions to One's ability to distribute property: A Guide for South Carolina Muslim Residents

In the Name of Allah, Most Gracious, Most Merciful.

Notable exceptions to one's ability to distribute property:

JOINT ACCOUNT/OWNERSHIP:

In South Carolina, a jointly owned property with the rights of survivorship automatically passes onto the survivor. **South Carolina permits a surviving spouse to either take 1/3 of the decedent's Probate estate or they may take under the will; but not both.** South Carolina joint tenancy laws clearly conflicts with Islamic law in that upon the death of one joint tenant, their interest in said property passes directly to the other

joint tenants by the right of survivorship. Thus, the survivor will hold the property as sole owner. However, according to Islamic law, upon the death of a party in joint ownership the surviving joint owner will not have full ownership of the property. The surviving joint owner shall only be entitled to half, or their original share of the property in question. The remaining half of the joint property belongs to the heirs of the deceased partner. Thus, in the case of a Muslim husband and wife whom jointly own a house, it is imperative that they pursue services that will fulfill their needs.

In South Carolina there are three major ways in which real property can be owned by two or more persons. One has the option of either pursuing a tenancy in common, joint tenancy with a right of survivorship or a tenancy in common with a right of survivorship.

Tenancy in Common: Most deeds to two or more people are drafted to create a "tenancy in common." Under a tenancy in common form of ownership, each owner has an undivided interest in the said property which passes to an owner’s respective heirs or devisees if the owner possessed a valid Last Will and Testament naming said individuals. A tenancy in common is the default co-tenancy in South Carolina and is included in a decedent’s Probate estate. Thus, in the Islamic world where an example involves the

case of a Muslim husband and wife whom jointly own a house, it is imperative that they employ a nuzriah or hibah ruqba to achieve the successful transfer of the property to the other joint tenant. However, the type of ownership can be changed to tenancy in common; wherein through the assistance of a Solicitor, it can be specified in a deed that each spouse agrees that upon the death of other, the survivor will allow half of the property to form part of the estate of the deceased and is to be distributed among their heirs. Basically the surviving spouse utilizes a Letter of Wishes and agrees to give up survivorship.

Joint Tenancy with a Right of Survivorship: By including specific language in a deed one can create a "joint tenancy with a right of survivorship." If a joint tenant with a right of survivorship expires, one's interest is immediately extinguished and ownership of the property rests with the remaining joint tenant(s). Nevertheless, if the property is owned by more than two persons and one of the joint tenants dies, the remaining members will own the property as tenants in common since the original "unity" of ownership is then broken. The unity is also broken if one of the joint tenants pass on their interest to another or the property is divided by agreement or partition. It is also important to note that by statute, as the rules apply to

an eligible Islamic heir, a joint tenant who effects a severance of the tenancy by murdering their joint tenant forfeits their right of survivorship.

Tenancy in Common with a Right of Survivorship: Differing from a joint tenancy with a right of survivorship in that the survivorship interest of the remaining co-tenants is a "vested future interest" and is indestructible. Even if a "unity" is broken by one or more co-tenants, the remaining tenants interest in obtaining ownership of that interest passes with the conveyance. It is therefore the least common form of ownership. However, it is especially helpful in instances wherein there are multiple owners to a joint property with the desire to eliminate the ability for one cotenant to unilaterally destroy the survivorship interest of those remaining.

Many married couples have joint bank accounts and joint ownership of properties. When a couple acquires a joint account or property, whether for convenience or to avoid taxation, the ownership is considered joint unless it can be proven otherwise. Also, **in the event that one owns their house as joint tenants with their spouse in South Carolina, as stated earlier, upon the death of the other spouse, the remaining share of the house passes directly to the surviving spouse and will not be considered as part of the deceased's estate.** Moreover, a couple

may own all of their assets in joint names but according to Islamic law, the share that they own in these assets is regarded as one's personal wealth. Consequently, upon the death of a spouse involved in said joint ownership, a number of problems can arise with regard to the inheritance of one's estate. Therefore, **in the event that joint ownership is "nonexistent" and a spouse dies, the couple's home is to be divided among the designated heirs specified in the Quran.**

The surviving spouse may be granted the option to purchase the shares from the heirs and remain in the home. Moreover, in the event that the surviving spouse wishes to remain in the home, but does not have adequate finances to purchase the additional shares from the heirs, the surviving spouse can continue to live in the house with the permission of the heirs whom are willing to accommodate them, but the heirs will maintain ownership of the remaining shares. Also, the surviving spouse can remain in the home if the shareholders voluntarily award part or their share to them while they are still living; i.e., prior to the disease of death.

An additional option where the surviving spouse decides to leave the home, involves the house being sold with the proceeds of the sale being divided among the heirs in question. It should also be noted that even in instances where a couple owns

everything in joint names, each spouse is required to create their own Last Will and Testament; because, under Islamic law, the distribution of the wife's estate is calculated differently from that of her husband's. Also, there will be certain items such as personal jewelry which will not be classified under the couple's joint status. Thus, a Muslim couple in South Carolina with the intent that the other spouse obtains their share of the home upon their death should purchase the remaining shares of the house from the deceased's heirs upon their death to comply with Islamic law.

GIFTS (HIBAH):

Another important aspect is the granting of a gift of such an item which is owned in partnership. If the item is such that it is indivisible (such as a car, a small little home, etc.) in the sense that if it were divided, no party would be able to derive any proper benefit from their portion, any partner in such an item may give away his share as a gift without any division between the partners taking place. However, if the item is divisible, such as a big plot of vacant land, etc., no partner may grant his portion as a gift without the co-owned item being first distributed. If a share is given as a gift prior to the distribution, such a gift is null and void.

Hibah may be employed in instances when the rules of Islamic inheritance do not allow some beneficiaries the immediate right of inheritance or when no will has been created. Unlike wasiyya which may be in the form of goods, debts or benefits, hibah is a "gift" that only comes in the form of property. However, with regard to Islamic fiqh it means giving the ownership of anything valuable to another without reward or compensation, with a definite proposal on the part of the donator and acceptance on the part of the intended recipient. Ruqba on the other hand is a kind of gift and is also called Umra, which is derived from the Arabic verb meaning "to wait;" because, both the donor and the receiver used to wait for the death of each other so the house would solely belong to them permanently. Hibah ruqba is therefore a conditional gift determined by the hibah giver whereby the gifted property would be owned by the intended recipient in the event that death occurs to the hibah giver; i.e., when one gives property as a gift to a recipient, the said property would only be transferred to the beneficiary as their personal property only upon the death of the hibah giver. If the beneficiary in question dies before the hibah giver, then the property automatically defaults back to the original owner (the hibah giver).

Hibah results from a declaration by the owner of a specific asset stating that they will donate said asset to a specified beneficiary, and that they intend to hold said asset for the benefit of the beneficiary. The terms and conditions wherein the settlor is holding the assets should be documented in writing. For example: The house or any property that should be given away as a form of hibah should be placed in a Joint trust. The trust should then be held by a credible legal firm. During the lifetime of the co-owners, each should contract a document stating that they would give or "hibah" the property to their co-owner on the event of their death. Upon their death, the legal firm could execute the hibah or gift of the dead co-owner in favor of the surviving party. The evidence for this practice is a hadith collected by Bukhari, narrated by 'Abida, reports: "**If he dies and the gift has been set aside while the one who was given it was alive, then it is for his heirs. If it was not set aside, it is for the heirs of the one who gave it...**'"

Another example involves an aunt who deposits an amount of money in an Islamic bank in the name of her niece as hibah, then the niece (who is the beneficiary of the gift) becomes its owner. However, if the niece in question is a minor, it is the niece's guardian who will possesses it on her behalf if she has

not yet matured enough to dispose of her wealth rationally. Either way, this tool ensures that the intended beneficiary will receive what property is intended for them; thus, satisfying the interest of both the giver and receiver.

In view of these facts, it is necessary for Muslims residing in South Carolina to have a joint tenancy modeled after a Hibah Ruqba contract between co-owners in order to meet the needs of the survivorship principle in joint ownership. Hibah Ruqba is an effective tool in estate planning in the sense that it may be used to facilitate the conventional application of joint tenancy with the right of survivorship, without breaking certain Islamic rules and doctrines regarding "joint ownership" transactions.